

PART A
Review of ARB Regulations Initiated
On or Before November 17, 2003

Background

The California Air Resources Board has conducted a review of regulations initiated on or before November 17, 2003, when Governor Schwarzenegger signed Executive Order S-2-03. Provisions 1a, 1b and 1d of EO S-2-03 required all state agencies in the Executive Branch to:

1. Cease processing rulemakings in process on November 17, 2003,
2. Reassess the regulatory impact on business of any proposed regulations pursuant to California Government Code section 11346.3, and
3. Prepare a report describing how these provisions were met, and submit that report to the Legal Affairs Secretary within 90 days.

Exceptions for individual rulemakings were possible if the agency concluded and the Department of Finance (DOF) concurred there were compelling emergency or other health and safety reasons to justify that the rulemaking proceed.

The ARB had 13 rulemakings in process on November 18, 2003. This report addresses how each of those rulemakings is being handled, consistent with the directives in the Executive Order. It also fulfills the reporting requirements of provision 1d.

Rule Review Process

Immediately after EO S-32-03 was signed, ARB staff suspended all major actions on pending rulemakings. This suspension included the submittal of regulations to the Office of Administrative Law (OAL), the initiation of new comment periods for regulations already proposed, and the approval of regulations by the Board. However, routine staff-level work such as consultation meetings with stakeholders, staff-led public workshops on proposed regulations, and internal analytical work needed to prepare regulations for hearing before the Board or for submittal to OAL, continued. In addition, shortly after the Executive Order was signed, ARB staff conducted an analysis to decide how to best comply with EO S-2-03 and to determine which, if any, regulations might merit an exemption as provided by provision 1a.

Results of Rule Review

ARB staff has completed its review of each of the rulemakings that were in process on November 17. This review considered a total of 13 separate rulemakings (see Attachment 1):

- Two regulations that had been filed with OAL prior to November 17;
- Six regulations had been approved by the Board prior to November 17; but not yet filed with OAL;
- One regulation had been heard by the Board prior to November 17, but not approved by the Board; and
- Four regulations had been noticed for hearings prior to November 17, but not yet considered for adoption by the Board.

Rulemakings Proceeding Pursuant to DOF Review and Approval

Each rulemaking was carefully assessed relative to the applicable provisions of EO S-2-03. As a result of these assessments the ARB identified compelling reasons to continue, on an expedited basis, with the adoption and processing of five regulations. Accordingly, on December 1, 2003, the ARB requested that DOF approve the expedited processing of the following five rulemakings (see attachment 2):

1. Enhanced Vapor Recovery at Retail Gasoline Stations
2. Transport Mitigation Requirements for Upwind Districts
3. Zero Emission Vehicle Program Modifications
4. Fees for Stationary Sources, Consumer Products and Paints
5. Verification Procedures for Diesel Emission Control Strategies

Based on the ARB analyses, DOF approved each of these requests via written memoranda on December 10 and 11, 2003 (see Attachment 3). As a result, the processing of the first two rulemakings, which were already at OAL on November 17, has been completed, and OAL has filed those rules with the Secretary of State. The third and fourth rules, which had been approved by the ARB but not yet submitted to OAL on November 17, have since been submitted to OAL. Finally, the amendments to the Diesel Retrofit Verification Procedures rule, which had been noticed for hearing prior to November 17 but not yet considered for adoption by the Board, was considered by the Board at its December 11, 2003 hearing. However, final action on this rule was delayed to allow additional comment. It will be reconsidered at the Board's February 26-27, 2004, meeting, at which time adoption is expected.

In addition to the five rulemakings identified above, ARB also identified the need to continue expedited consideration of three additional rulemakings, and, on December 1, 2003, requested DOF concurrence to proceed with hearings and

Board decisions on these previously noticed rules. The pending rulemakings in this category include:

- Heavy-Duty Diesel Engine Software Upgrade ("Chip Reflash"), and
- Two rules subject to court ordered hearing dates:
 - Air Toxic Control Measure for Stationary Diesel Engines
 - Air Toxic Control Measure for Transportation Refrigeration Units

Based on the ARB analyses, DOF approved each of these requests via memo on December 10, 2003 (See attachment 4). Each of these rulemakings, which had been noticed for hearings prior to November 17, was considered by the Board at its December 11, 2003, hearing. However, final action on all of these rules was delayed to allow additional comment and ensure that the public was able to provide comment on the rules in light of EO S-2-03. The two rules to control diesel particulate matter will be reconsidered at the Board's February 26-27, 2004, meeting, at which time adoption is expected. It is expected that the Heavy-Duty Diesel Engine Software Upgrade ("Chip Reflash") rulemaking will be reconsidered at the Board's March 25-26, 2004, meeting.

Rulemakings Proceeding with Additional Public Review

In addition to the rulemakings discussed above, five other rules were in process when EO S-2-03 was signed. These rulemakings were:

- Off-Highway Recreational Vehicles;
- Specifications for Sulfur in Diesel Fuel;
- Air Toxic Control Measure for Solid Waste Collection Vehicles;
- Exhaust and Evaporative Controls for Small Off-Road Engines; and
- Revised Incremental Reactivity Values.

The ARB's Governing Board approved the first four rules listed above prior to November 17, 2003. However, the rulemaking process was not complete, as 15-day changes to the regulation had not yet been circulated for public comment and the final rulemaking packages had not yet been filed with OAL. The last rulemaking, Revised Incremental Reactivity Values, had been noticed for an administrative hearing prior to November 17, but not yet considered for adoption.

To address these five rules under the Executive Order, ARB decided to take advantage of the normal post-hearing revision process, and explicitly seek comments pertinent to the provisions of EO S-2-03 (see Attachment 5). This will enable ARB to efficiently and effectively meet all of its objectives before the final regulatory language is formally adopted by ARB's Executive Officer and forwarded to OAL for review. Should major, substantive comments come forth during this process requiring the attention of ARB's Governing Board, staff will bring those comments and the pertinent regulatory issues back before the Board for its consideration.

The economic impact of each of the proposed rules has already been thoroughly assessed and considered during the rule development process. As part of the adoption process by the ARB, compliance with the economic impact as required by EO S-2-03 and by Government Code section 11346.3 will be fully demonstrated. Any comments received from the public pertaining to the provisions of EO S-2-03 will be considered and responded to. The adequacy of the impact assessments, and the ARB's response to comments will also be reviewed by the OAL, prior to OAL's determination to file the final rules with the Secretary of State.

Conclusion

EO S-2-03 affected 13 individual rulemakings in process at the ARB. Each of those rulemakings has been carefully considered and assessed relative to the requirements of the Executive Order. The provisions of the Executive Order are being met. Eight rulemakings were analyzed on an expedited basis. Each of these is now completed or proceeding, with DOF's concurrence. For the five remaining rulemakings, compliance with the provisions of EO S-2-03, including the opportunity for additional public comment, has been incorporated into the ongoing rulemaking process.

It should be noted that this Part A report only addresses rulemakings that were in process but not yet finalized as of November 17, 2003. Rules adopted, amended or repealed since January 6, 1999, but before November 17, 2003, are described in Part B of this report.

Part A - Attachment 1
Rulemakings in Process on November 17, 2003

Regulations filed with OAL prior to November 17, 2003 but not yet approved:

- Vapor Recovery at Retail Gasoline Stations
- Transport Mitigation Requirements for Upwind Districts

Regulations approved by the ARB Governing Board prior to November 17, 2003 but not filed with OAL:

- Zero Emission Vehicle Program Modifications
- Fees for Stationary Sources, Consumer Products and Paints
- Off-Highway Recreational Vehicles
- Specifications for Sulfur in Diesel Fuel
- Diesel Particulate Control Measure for Solid Waste Collection Vehicles, and
- Exhaust and Evaporative Controls for Small Off-Road Engines

Regulation heard by the ARB Governing Board prior to November 17, 2003 but not yet acted upon:

- Diesel Particulate Control Measure for Stationary Diesel Engines

Regulations noticed for hearings prior to November 17, 2003 but not yet considered for adoption by the ARB Governing Board:

- Verification Procedures for Diesel emission Control Strategies
- Heavy-Duty Diesel Engine Software Upgrade
- Air Toxic Control Measure for Transportation Refrigeration Units
- Revised Incremental Reactivity Values

**AIR RESOURCES BOARD REVIEW OF REGULATIONS
PURSUANT TO EXECUTIVE ORDER S-2-03**

PART A
Rulemakings Initiated
On or before November 17, 2003

PART B
Regulations Adopted, Amended or Repealed
Since January 6, 1999

PART A
Review of ARB Regulations Initiated
On or Before November 17, 2003

Background

The California Air Resources Board has conducted a review of regulations initiated on or before November 17, 2003, when Governor Schwarzenegger signed Executive Order S-2-03. Provisions 1a, 1b and 1d of EO S-2-03 required all state agencies in the Executive Branch to:

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3. Prepare a report describing how these provisions were met, and submit that report to the Legal Affairs Secretary within 90 days.

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The ARB had 13 rulemakings in process on November 18, 2003. This report addresses how each of those rulemakings is being handled, consistent with the directives in the Executive Order. It also fulfills the reporting requirements of provision 1d.

Rule Review Process

Immediately after EO S-32-03 was signed, ARB staff suspended all major actions on pending rulemakings. This suspension included the submittal of regulations to the Office of Administrative Law (OAL), the initiation of new comment periods for regulations already proposed, and the approval of regulations by the Board. However, routine staff-level work such as consultation meetings with stakeholders, staff-led public workshops on proposed regulations, and internal analytical work needed to prepare regulations for hearing before the Board or for submittal to OAL, continued. In addition, shortly after the Executive Order was signed, ARB staff conducted an analysis to decide how to best comply with EO S-2-03 and to determine which, if any, regulations might merit an exemption as provided by provision 1a.

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Rulemakings Proceeding Pursuant to DOF Review and Approval

Each rulemaking was carefully assessed relative to the applicable provisions of EO S-2-03. As a result of these assessments the ARB identified compelling reasons to continue, on an expedited basis, with the adoption and processing of five regulations. Accordingly, on December 1, 2003, the ARB requested that DOF approve the expedited processing of the following five rulemakings (see attachment 2):

1. Enhanced Vapor Recovery at Retail Gasoline Stations
2. Transport Mitigation Requirements for Upwind Districts
3. Zero Emission Vehicle Program Modifications
4. Fees for Stationary Sources, Consumer Products and Paints
5. Verification Procedures for Diesel Emission Control Strategies

Based on the ARB analyses, DOF approved each of these requests via written memoranda on December 10 and 11, 2003 (see Attachment 3). As a result, the processing of the first two rulemakings, which were already at OAL on November 17, has been completed, and OAL has filed those rules with the Secretary of State. The third and fourth rules, which had been approved by the ARB but not yet submitted to OAL on November 17, have since been submitted to OAL. Finally, the amendments to the Diesel Retrofit Verification Procedures rule, which had been noticed for hearing prior to November 17 but not yet considered for adoption by the Board, was considered by the Board at its December 11, 2003 hearing. However, final action on this rule was delayed to allow additional comment. It will be reconsidered at the Board's February 26-27, 2004, meeting, at which time adoption is expected.

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Board decisions on these previously noticed rules. The pending rulemakings in this category include:

- Heavy-Duty Diesel Engine Software Upgrade ("Chip Reflash"), and
- Two rules subject to court ordered hearing dates:
 - Air Toxic Control Measure for Stationary Diesel Engines
 - Air Toxic Control Measure for Transportation Refrigeration Units

Based on the ARB analyses, DOF approved each of these requests via memo on December 10, 2003 (See attachment 4). Each of these rulemakings, which had been noticed for hearings prior to November 17, was considered by the Board at its December 11, 2003, hearing. However, final action on all of these rules was delayed to allow additional comment and ensure that the public was able to provide comment on the rules in light of EO S-2-03. The two rules to control diesel particulate matter will be reconsidered at the Board's February 26-27, 2004, meeting, at which time adoption is expected. It is expected that the Heavy-Duty Diesel Engine Software Upgrade ("Chip Reflash") rulemaking will be reconsidered at the Board's March 25-26, 2004, meeting.

Rulemakings Proceeding with Additional Public Review

In addition to the rulemakings discussed above, five other rules were in process when EO S-2-03 was signed. These rulemakings were:

- Off-Highway Recreational Vehicles;
- Specifications for Sulfur in Diesel Fuel;
- Air Toxic Control Measure for Solid Waste Collection Vehicles;
- Exhaust and Evaporative Controls for Small Off-Road Engines; and
- Revised Incremental Reactivity Values.

The ARB's Governing Board approved the first four rules listed above prior to November 17, 2003. However, the rulemaking process was not complete, as 15-day changes to the regulation had not yet been circulated for public comment and the final rulemaking packages had not yet been filed with OAL. The last rulemaking, Revised Incremental Reactivity Values, had been noticed for an administrative hearing prior to November 17, but not yet considered for adoption.

To address these five rules under the Executive Order, ARB decided to take advantage of the normal post-hearing revision process, and explicitly seek comments pertinent to the provisions of EO S-2-03 (see Attachment 5). This will enable ARB to efficiently and effectively meet all of its objectives before the final regulatory language is formally adopted by ARB's Executive Officer and forwarded to OAL for review. Should major, substantive comments come forth during this process requiring the attention of ARB's Governing Board, staff will bring those comments and the pertinent regulatory issues back before the Board for its consideration.

The economic impact of each of the proposed rules has already been thoroughly assessed and considered during the rule development process. As part of the adoption process by the ARB, compliance with the economic impact as required by EO S-2-03 and by Government Code section 11346.3 will be fully demonstrated. Any comments received from the public pertaining to the provisions of EO S-2-03 will be considered and responded to. The adequacy of the impact assessments, and the ARB's response to comments will also be reviewed by the OAL, prior to OAL's determination to file the final rules with the Secretary of State.

Conclusion

EO S-2-03 affected 13 individual rulemakings in process at the ARB. Each of those rulemakings has been carefully considered and assessed relative to the requirements of the Executive Order. The provisions of the Executive Order are being met. Eight rulemakings were analyzed on an expedited basis. Each of these is now completed or proceeding, with DOF's concurrence. For the five remaining rulemakings, compliance with the provisions of EO S-2-03, including the opportunity for additional public comment, has been incorporated into the ongoing rulemaking process.

It should be noted that this Part A report only addresses rulemakings that were in process but not yet finalized as of November 17, 2003. Rules adopted, amended or repealed since January 6, 1999, but before November 17, 2003, are described in Part B of this report.

Part A - Attachment 1
Rulemakings in Process on November 17, 2003

Regulations filed with OAL prior to November 17, 2003 but not yet approved:

- Vapor Recovery at Retail Gasoline Stations
- Transport Mitigation Requirements for Upwind Districts

Regulations approved by the ARB Governing Board prior to November 17, 2003 but not filed with OAL:

- Zero Emission Vehicle Program Modifications
- Fees for Stationary Sources, Consumer Products and Paints
- Off-Highway Recreational Vehicles
- Specifications for Sulfur in Diesel Fuel
- Diesel Particulate Control Measure for Solid Waste Collection Vehicles, and
- Exhaust and Evaporative Controls for Small Off-Road Engines

Regulation heard by the ARB Governing Board prior to November 17, 2003 but not yet acted upon:

- Diesel Particulate Control Measure for Stationary Diesel Engines

Regulations noticed for hearings prior to November 17, 2003 but not yet considered for adoption by the ARB Governing Board:

- Verification Procedures for Diesel emission Control Strategies
- Heavy-Duty Diesel Engine Software Upgrade
- Air Toxic Control Measure for Transportation Refrigeration Units
- Revised Incremental Reactivity Values



Terry Tamminen
Agency Secretary

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Arnold Schwarzenegger
Governor

PART A/ATTACHMENT 2

MEMORANDUM

To: Terry Tamminen
Secretary

From: Alan C. Lloyd
Chairman

Alan Lloyd

Date: December 1, 2003

Subject: **EXECUTIVE ORDER S-2-03**

This memorandum is to clarify ARB's request for expedited review and/or individual exemptions under Executive Order S-2-03. This memorandum entirely replaces our prior memoranda of November 19, 2003 and November 25, 2003, which are now integrated into this single document. This memorandum was also expanded to more thoroughly address some of the questions that have arisen thus far. ARB is making five separate requests in this memorandum:

- 1.) **Exempt three (3) adopted regulations from review:**
 - Emergency Regulation for Vapor Recovery at Retail Gas Stations;
 - Zero Emission Vehicle Program Modifications
 - Fees for Stationary Sources, Consumer Products and Paints
- 2.) **Expedite review of one previously adopted regulation:**
 - Transport Mitigation Requirements for Upwind Districts
- 3.) **Allow ARB to modify one existing regulation to avoid adverse consequences on January 1, 2004:**
 - Verification Procedures for Diesel Emission Control Strategies
(Note: referred to in 11/19/03 memorandum as "Adjustment to Nitrogen Dioxide Cap for Diesel Retrofit Devices")

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

- 4.) **Allow ARB to proceed to public hearing on court ordered hearings under the Settlement Agreement for the 1994 South Coast State Implementation Plan (*several rules*) and for one rule necessary to comply with the 2003 South Coast SIP update, namely:**

--Heavy-Duty Diesel Engine Software Upgrade ("chip reflash")

- 5.) **Allow ARB to convene normal monthly Board hearings, provided votes are held open pending completion of the S-2-03 review.**

Regarding the fifth request, there is a value to convening public hearings that could be lost during a 180-day moratorium on all regulatory activity. Public hearings give the ARB and stakeholders an opportunity to air the issues associated with each regulation. It also enables the Board to address any outstanding concerns through directions to staff for refinement or modifications. This is part of the normal rulemaking process and often dramatically reduces the controversy associated with any single rulemaking. Holding the Board vote open until the S-2-03 review is completed, as we are proposing, should reassure all stakeholders that there is no intent to ignore or evade the regulatory review process set forth by the Governor. It should also be noted that even Board-adopted rules have no force or effect until the OAL review process is complete (approximately 9-10 months following each public hearing). For all these reasons, ARB is proposing its regular monthly hearings be allowed and that "cease processing" be narrowly interpreted to mean not advancing regulations to OAL for action until the EO S-2-03 process is finished, or unless a rule-specific exemption has been granted.

Attachment 1 to this memorandum explains the basis for ARB requests #1 through #4. ARB request #5 is addressed by the preceding paragraphs. Attachment 2 contains a summary table of ARB regulations before OAL for review; rules adopted by the Board but not yet submitted to OAL; fully approved rules that take effect within the next 180 days; and rules that have been noticed and/or are scheduled for an ARB hearing between now and May 2004.

Attachment 1

FACTUAL BASIS FOR ARB REQUESTS REGARDING EXECUTIVE ORDER S-2-03

REQUEST #1 - EXEMPT THREE REGULATIONS FROM REVIEW

1.A. Emergency Regulation for Vapor Recovery at Retail Gas Stations

Background: ARB has adopted an emergency regulation to suspend an existing, technology-forcing requirement for gasoline vapor recovery at retail gas stations that turned out to be infeasible. Our emergency rule is pending final OAL approval on December 2, 2003. If the emergency vapor recovery regulation is waylaid, the original regulation will be re-imposed and industry will be unable to comply. As a result, all permitting activity for, and installations of, new retail gas stations must cease until the vapor recovery regulation is officially modified.

Proposed Solution: *Exempt this business-friendly rulemaking from review.*

1.B. Zero Emission Vehicle Program Modifications

Background. In March 2003, ARB amended its landmark Zero Emission Vehicle (ZEV) regulation to place less emphasis on battery technologies in favor of hydrogen fuel cells and gasoline hybrids. The final statement of reasons and rulemaking file for these changes must be submitted to OAL by January 9, 2004. That deadline cannot be reset or extended except by a narrow procedural maneuver (see below). If ARB misses the filing deadline, the 2003 ZEV regulation will be voided and must be adopted all over again. There is no pre-existing rule to fall back upon. The 2001 ZEV regulation was legally enjoined due to a fuel economy clause that the presiding judge determined a) was legally preempted by federal law; and b) was not severable from the rule. That injunction was dismissed once the ZEV rule was amended in March 2003, but would be rapidly reinstated if the 2003 amendments are vacated. The 2003 ZEV regulations establish increasing gold, silver and bronze requirements for the 2005 through 2018 model years of production. If those are allowed to lapse, all that will remain is relatively modest fleet average emission standards for regular gasoline automobiles. California would lose all of its requirements and incentives for hydrogen fuel cells, internal combustion hydrogen vehicles, regular hybrids, plug-in hybrids, battery electrics, natural gas vehicles, and extremely clean gasoline vehicles (partial ZEVs with no evaporative emissions and super ultra low exhaust).

Proposed Solution: *Exempt the landmark ZEV regulation from review.*

1.C. Fees for Stationary Sources, Consumer Products and Paints

Background: This year, \$14.4 million in General Funds were removed from ARB's budget to address California's fiscal crisis, with the proviso that those funds be replaced with additional fees on polluting industries, deposited into the special purpose Air Pollution Control Fund. ARB amended its existing fee regulation in July 2003 to achieve that objective. ARB is authorized to levy fees on stationary sources, manufacturers of consumer products, and manufacturers of architectural coatings (paints) whose emissions collectively result in 250 tons per year or more of pollution. The regulation contains a 60-day billing cycle once the rule is effective. To meet our FY 2003/04 cash flow needs, ARB has to start the notice and billing process no later than March 2004. The fee regulation is currently in the 15-day change process for amendments directed the July hearing. Following that step, it needs to be submitted to OAL for review. ARB had intended to get the package to OAL by the end of January at the latest, so OAL's review would be finished by the end of February. The Executive Order prevents ARB from taking that step and endangers the Board's fiscal solvency.

Proposed Solution: Exempt this budget-balancing fee regulation from review.

REQUEST #2 - EXPEDITE REVIEW OF ONE ADOPTED REGULATION (Transport Mitigation Requirements for Upwind Air Districts)

Background: In June 2003, ARB adopted revised transport mitigation requirements for upwind air districts. This regulation has been submitted to OAL already, in advance of the April 2, 2004 filing deadline for that final statement of reasons (FSOR) and rulemaking file. There is not enough time to pull these regulations for a full 180-day review. If the transport mitigation regulation is not resubmitted by the original filing deadline, it will lapse completely. Prior to this rulemaking, ARB had not updated its transport requirements for more than ten years. The previous requirements are stale and ineffective. Dealing with Bay Area transport was part of last year's pitched debate over air pollution in the San Joaquin Valley. The Legislature passed a series of bills increasing smog controls in that region and imposed enhanced vehicle Smog Check requirements upwind, in the San Francisco Bay Area. In parallel, ARB updated its transport mitigation requirements and its protocols for allocating incentive funds between local air districts. The balance struck on the former rule was tenuous. This would not be a good hearing to hold all over again.

Proposed Solution: Accelerate rule review to meet the 4/2/04 OAL filing deadline. Alternatively, this rule could be exempted from review altogether.

**REQUEST #3 – ALLOW BOARD TO MODIFY ONE EXISTING REGULATION TO
AVOID ADVERSE CONSEQUENCES ON JANUARY 1, 2004
(Verification Procedures for Diesel Emission Control Strategies)**

Background. ARB's existing rule for verifying diesel particulate retrofit devices imposes a 20% cap on nitrogen dioxide (NO₂) emissions. NO₂ can be formed by chemical reactions on the filter medium as it is reducing particulate; there are also engine-out emissions of NO₂ upstream of the particulate filter. Although they are doing extremely well at reducing particulate (by 85% or more), no filter manufacturer can simultaneously meet the NO₂ limit at this time. If we do not correct this problem, all existing diesel filter certifications will lapse on January 1, 2004, when the 20% NO₂ cap is imposed by operation of law. As a result, transit bus fleets subject to retrofit rules will be unable to continue with their device installation process. Likewise, other fleet operators in the process of procuring diesel filters will be unable to obtain a complying device.

The warranty provisions of the rule are equally urgent. On November 21, 2003, ARB staff met with all of the major diesel retrofit control device manufacturers (Englehardt, Johnson-Matthey, NGK and Corning). They unanimously expressed profound concern over the existing warranty provisions and said they would have no choice but to quit the California market unless those are modified. California cannot afford to lose these companies' participation in diesel clean-up programs. As noted above, adopted rules for transit buses and trash trucks require the use of retrofit devices. Also, the State has invested millions of dollars in cleaning up older, high emitting diesel vehicles, in large part through the use of retrofit filters. All of these regulatory and incentive programs require ARB-certified retrofit devices as a prerequisite for compliance and/or funding.

ARB is requesting approval to modify its existing diesel retrofit verification procedures at its December 11-12, 2003 public hearing. It is necessary that the Board Members vote so staff can act immediately to replace the existing regulation with a new, conditional approval process. The latter would remain in effect until OAL has completed its review of the rulemaking, several months later, at which time the official regulatory changes would take effect. ARB staff considered accomplishing the same outcome by administrative action but was advised by legal counsel that a vote by the Board was necessary to suspend the problematic aspects of the existing rule. The Executive Officer's delegated authority does not encompass such acts.

Proposed Solution: Allow ARB to proceed with rule amendments at its December 11-12, 2003 public hearing, including a Board vote, thereby officially signaling a change in existing verification procedures. Follow-up with EO S-2-03 review process prior to final approval by OAL.

**REQUEST #4 – ALLOW BOARD TO PROCEED ON COURT ORDERED HEARINGS
AND OTHER SIP RELATED ITEMS**
(including Heavy-Duty Diesel Engine Software Upgrade or “chip reflash”)

Background: Many of ARB's rule adoption dates are set by court order. In June 2003, ARB reached a settlement with three environmental groups who sued over partial non-implementation of the 1994 South Coast State Implementation Plan (SIP). The court-approved Settlement Agreement requires ARB to bring to hearing, by fixed dates, proposed regulations for certain emission sources. Public hearings on ten rulemakings must occur by December 31, 2003. Of these, ARB has completed just five so far (trash trucks, small off-road engines, low sulfur diesel fuel, alignment of heavy-duty gasoline truck standards, and stationary diesel engines). The remaining public hearings are supposed to be convened by December 31. The ARB is already running a couple of months behind deadline. The Executive Order could potentially put ARB even further behind and at greater risk of renewed legal action.

It should be noted that ARB's governing board is not required by the Settlement Agreement to adopt these rules; only to bring them to public hearing on or before the date specified. However, a separate, free-standing element of the Settlement Agreement requires ARB to achieve certain tonnage reductions by fixed deadlines so prompt regulatory action of some kind is implied. If ARB does not go to hearing, the environmental plaintiffs could return to court for a supplemental order. While they are unlikely to get such an order within 180 days, they could certainly generate a fair amount of adverse press coverage during that time. The current ARB hearing calendar for SIP Settlement rules is:

- Dec 11, 2003 - Transportation Refrigeration Units
- Jan 22, 2004 - Enhanced Vapor Recovery for Above-Ground Tanks and
- Idling Controls for New Diesel Trucks
- Feb 26, 2004 - Fuel Tanker Trucks
- April 22, 2004 - On-Board Diagnostics for Heavy-Duty Trucks

Like the court-ordered rulemakings described above, the 2003 update of the South Coast SIP requires ARB to adopt and fully implement, by December 31, 2005, software upgrades for heavy-duty diesel engines (“chip reflash”). This rule accounts for ~40 tons per day, statewide, as compared to the lawn & garden rule California just fought to save in Congress at 25 tons per day. It also accounts for 75% of the emission reductions required by the end of 2005 to meet ARB's legally binding SIP commitment on the South Coast. It will take ARB approximately 12-18 months to fully implement this rule once adopted. For that reason, acting on the rule now is essential to meeting the 2005 deadline.

Here is some additional background on the "chip reflash" rule. In the mid-1990's, heavy-duty engine manufacturers were found to have installed defeat devices in certain model year vehicles to turn off emission controls during high load conditions. The U.S. EPA and ARB brought separate enforcement actions against the pertinent companies. In lieu of a mandatory recall, the U.S. EPA and ARB ultimately signed settlement agreements with the engine manufacturers in 1998. The manufacturers admitted no fault, but also agreed to install corrective software (chip reflash) as engines were brought in for major service such as engine rebuilds. The software fix was also to be made available to any single vehicle owner, free of charge, upon request.

The U.S. EPA and ARB both believed that these software upgrades would be fully accomplished within 4-5 years. Instead, less than 10% of all trucks in California are reflashed as of this date and more than 90% still have excess emissions. The proposed rule would require truck owners to request a reflash, thereby triggering the "free of charge" and "make available" provisions of the settlement.

Proposed Solution: Allow ARB to proceed with public hearings on the rules required by the South Coast 1994 SIP Settlement Agreement and on other SIP related rules where delay would prevent compliance with adopted SIP commitments.

REQUEST #5 – ALLOW ARB TO CONVENE NORMAL MONTHLY BOARD HEARINGS, PROVIDED VOTES ARE HELD OPEN PENDING COMPLETION OF THE EO S-2-03 REVIEW

Rationale provided in cover memorandum, page 2.

Attachment 2

ARB Regulatory Actions Affected by Executive Order S-2-03 REQUIRING SUPPLEMENTAL REVIEW WITHIN 180-DAYS (BY MAY 14, 2003)

Section 1(a) of Executive Order S-2-03. Adopted rules already filed at OAL for review:

1. Vapor Recovery Test Procedures

- ☑ Filed with OAL: 10/21/03
- ☑ OAL Decision pending: 12/2/03

Emergency regulation to postpone infeasible technology requirement; if not approved will immediately prohibit siting, permitting, installation and operation of new or modified gas stations.

2. Ozone Transport Mitigation Regulations 2003

- ☑ Filed with OAL: 10/21/03
- ☑ OAL Decision pending: 12/2/03

12-month clock for ARB submittal of complete rulemaking file expires 4/2/04. If withdrawn and not resubmitted by that date, the rule will lapse and will have to be noticed, heard and adopted all over again.

Section 1(b) of Executive Order 2-3-03. Regulations adopted by the ARB but not yet submitted to OAL for review and regulations noticed for public hearing by the Board:

Adopted by ARB but Final Statement of Reasons (FSOR) and complete rulemaking file not yet submitted to OAL...

1. Modifications to Zero Emission Vehicle (ZEV) Regulations
 - ☑ Hearing Date: 2/27/2003; Postponed to 3/27/2003
 - ☑ Statutory Filing Deadline: 1/9/2004
2. Fees for Stationary Sources, Consumer Products
 - ☑ Hearing Date: 7/24/2003
 - ☑ Statutory Filing Deadline: 6/4/2004
3. Off-Highway Recreation Vehicles
 - ☑ Hearing Date: 7/24/2003
 - ☑ Statutory Filing Deadline: 6/4/2004

4. Specifications for Motor Vehicle Diesel Fuel
 - ☛Hearing Date: 7/24/2003
 - ☛Statutory Filing Deadline: 6/4/2004
5. Solid Waste Collection Vehicles
 - ☛Hearing Date: 7/24/2003; Postponed to 9/24/2003
 - ☛Statutory Filing Deadline: 6/4/2004
6. Control Measure to Reduce Exhaust and Evaporative Emissions from Off-Road Engines
 - ☛Hearing Date: 9/24/2003
 - ☛Statutory Filing Deadline: 8/6/2004

If the 12-month filing deadline is missed for any of the regulations identified above, those regulations will be voided and must be noticed, heard and adopted all over again.

Initial Statement of Reasons submitted to OAL, heard by ARB, final action pending...

7. Air Toxics Control Measure for Stationary Diesel Engines
 - ☛Hearing Date: 11/20/2003

Board heard proposed regulation, took testimony, deliberated, and provided direction to staff for further refinements; final vote continued to future hearing (date tbd).

Initial Statement of Reasons submitted to OAL, noticed for public hearing, not yet heard by the ARB...

8. Administrative Hearing – Revised Tables of Maximum Incremental Reactivity Values
 - ☛Hearing Date: 12/3/2003
9. Heavy Duty Diesel Engine Software Upgrade (Chip Reflash)
 - ☛Hearing Date: 12/11/2003 (postponed from 10/23/2003)
10. Air Toxics Control Measure for Transport Refrigeration Units
 - ☛Hearing Date: 12/11/2003
11. Trap Diesel Verification Procedure Modifications
 - ☛Hearing Date: 12/11/2003

Initial Statement of Reasons (ISOR) due to OAL to proceed to public hearing on January 22-23, 2004...

12. California Motor Vehicle Service Information
☐ ISOR due: 11/25/2003

13. PM2.5 Nonattainment Area Designations
☐ ISOR due: 11/25/2003

14. Continuation of Stationary Diesel Engine Rule
☐ ISOR due: n/a (already submitted)

There are also several regulatory items planned for February, March, April, May and June 2004 that could be affected by the 180-day review if it is interpreted to stop the processing of ISORs by OAL.

Section 1(c) of Executive Order S-2-03. Suspend or postpone the effective date of any regulations published in the California Regulatory Notice Register, but not yet effective. ARB has just one regulation taking effect in next 180-days:

1. LEV II 2002 Heavy-Duty Otto Cycle (gasoline) Engines
☐ Approved by OAL: 11/4/2003
☐ Effective date of regulation: 12/3/2003

A temporary delay in the effective date of this rule would not cause any significant problems because it does not apply until the 2007 model year. The rule aligns state and federal standards for heavy-duty gasoline engines.

Section 1(d) and 1(e) of Executive Order S-2-03. Reporting requirements.

1) ARB must reassess all pending regulations. 2) ARB must also submit a report on all regulations adopted, amended, or repealed since January 6, 1999. Both reports are no later than 2/13/2000 to the Governor's Legal Affairs Secretary, and must specifically address:

1. The impact of the regulations on California businesses;
2. The authority for the regulatory action; and
3. Conformity of the regulations with the statutory criteria: necessity; authority; clarity; consistency; reference; and non-duplication.

Section 2 of Executive Order S-2-03. By 12/13/03, each Agency shall identify any issuance, utilization, enforcement, or attempt at enforcement of any guideline, criterion, bulletin, manual, instruction, order or standard of general application which has not been adopted as a regulation in potential violation of Government Code section 11340.5(a). Those findings shall be submitted to OAL and the Governor's Legal Affairs Secretary.

Aimed at shadow regulations; no effect on ARB expected.

DEPARTMENT OF
FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET

PART A/ATTACHMENT 3

December 10, 2003

Mr. Alan C. Lloyd
Chairman
Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Mr. Lloyd:

APPROVAL OF REQUEST FOR EXCEPTION UNDER EXECUTIVE ORDER S-2-03

Pursuant to paragraph 1 of Executive Order S-2-03, the Director of Finance hereby **approves** the request of December 1, 2003 of the Air Resources Board to exempt from review and continue implementation of the following adopted emergency regulations:

- Vapor Recovery at Retail Gas Stations
- Fees for Stationary Sources, Consumer Products and Paints

These are CalEPA Agency Secretary requests and the Governor's Legal Affairs Office has no objection to granting these exceptions. We will review the Fiscal Impact Statements for these rulemaking packages when they are submitted as permanent regulations. (Finance does not review these statements during the expedited, emergency process.)

The Vapor Recovery emergency rulemaking must be implemented immediately to continue suspension of an existing requirement that turned out to be technically infeasible. The Fees for Stationary Sources emergency rulemaking also must be implemented this month to enable the Board to meet its current year budget with fees rather than General Fund, as required by the 2003 Budget Act.

DONNA ARDUIN, Director of Finance

By: 

DEPARTMENT OF
FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

December 10, 2003

Mr. Alan C. Lloyd
Chairman
Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Mr. Lloyd:

APPROVAL OF REQUEST FOR EXCEPTION UNDER EXECUTIVE ORDER S-2-03

Pursuant to paragraph 1 of Executive Order S-2-03, the Director of Finance hereby **approves** the request of December 1, 2003 of the Air Resources Board to proceed with the rulemaking process to modify the following existing regulation:

- Verification Procedures for Diesel Emission Control Strategies
(Adjustment to Nitrogen Dioxide Cap for Diesel Retrofit Devices)

The Governor's Legal Affairs Office has no objection to granting this exception, and we reviewed this package and the Fiscal Impact Statement in November.

This is a CalEPA Agency Secretary request to proceed with rulemaking to modify a currently infeasible filter requirement and warranty provisions that threaten continued implementation of diesel clean-up programs critical to improving the State's air quality. Specifically, per your memorandum, we understand that without immediate action all existing diesel filter certifications will lapse on January 1, thereby precluding transit bus fleets, for example, from procuring diesel filters capable of complying with both the nitrogen dioxide and particulate matter emissions caps. Additionally, without modification of the existing warranty provisions, we are concerned that all the major diesel retrofit control device manufacturers may quit the California market, which would constitute a setback both to business and air quality.

DONNA ARDUIN, Director of Finance

By: 



DEPARTMENT OF
FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO, CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

December 11, 2003

Mr. Alan C. Lloyd
Chairman
Air Resources Board
1001 I Street
Sacramento, CA 95814

DEC 29 2003

Dear Mr. Lloyd:

APPROVAL OF REQUEST FOR EXCEPTION UNDER EXECUTIVE ORDER S-2-03

Pursuant to paragraph 1 of Executive Order S-2-03, the Director of Finance hereby **approves** the request of December 1, 2003 of the Air Resources Board and California Environmental Protection Agency to:

1) Exempt from review and continue implementation of the following adopted regulation:

- Zero Emission Vehicle Program Modifications

2) Expedite review of the following adopted regulation:

- Transport Mitigation Requirements for Upwind Districts

These are requests of the CalEPA Agency Secretary. The Governor's Legal Affairs Office has no objection to granting the Zero Emission Vehicle regulation exception, but has not yet commented on the request to expedite review of the Transportation Mitigation regulation. We reviewed these packages and approved their Fiscal Impact Statements last spring.

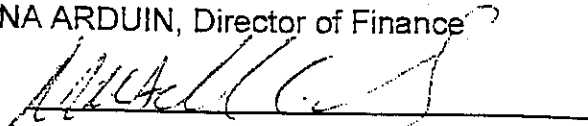
Per your memorandum and subsequent email, we understand that the Zero Emission Vehicle modifications must be filed by January to implement the new emphasis on hydrogen fuel cells and gasoline hybrids, and that failure to meet this filing deadline would leave no regulations under which to administer this landmark program. We further understand that the new rules will be less expensive to automakers by allowing them to use ultra-clean gasoline technologies and hybrids in lieu of mass producing zero emissions vehicles, which are still in the pre-commercial stage of development.

Similarly, based upon information provided by the Air Board, we understand that an expedited review of the existing Transport Mitigation regulation is necessary to ensure

the Board meets the final filing deadline of April 2, 2004, and avoids reversion to outdated regulations.

DONNA ARDUIN, Director of Finance

By:

A handwritten signature in dark ink, appearing to read "Donna Arduin", is written over a horizontal line.

**DEPARTMENT OF
FINANCE****PART A/ATTACHMENT 4****ARNOLD SCHWARZENEGGER, GOVERNOR**

915 L STREET ■ SACRAMENTO CA ■ 95814-3705 ■ WWW.DOF.CA.GOV

December 10, 2003

Mr. Alan C. Lloyd
Chairman
Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Mr. Lloyd:

APPROVAL OF REQUEST FOR EXCEPTION UNDER EXECUTIVE ORDER S-2-03

Pursuant to paragraph 1 of Executive Order S-2-03, the Director of Finance hereby approves the request of December 1, 2003 of the Air Resources Board and the California Environmental Protection Agency to:

- 1) Allow the Air Board to proceed to public hearing on court-ordered hearings (for rulemakings) pursuant to the Settlement Agreement for the 1994 South Coast State Implementation Plan (SIP), and for the "Heavy-Duty Diesel Engine Software Upgrade" rulemaking necessary to comply with the 2003 South Coast SIP.
- 2) Allow the Air Board to convene normal monthly Board hearings, provided votes are held open on rulemaking actions pending completion of the S-2-03 review.

This is a CalEPA Agency Secretary request for which we have not yet received concurrence from the Governor's Legal Affairs Office. However, we concur that it is appropriate for the Air Board to proceed with its rulemaking hearings as necessary to comply with court orders and to avoid a backlog of hearing activities at a later date.

DONNA ARDUIN, Director of Finance

By: 

Part A - Attachment 5
Solicitation of Public Comment

The following notice was posted in the Air Resources Board website following issuance of the Executive Order and receipt of implementing instructions from the Secretary of Legal Affairs and the Department of Finance.

Opportunity for Public Comment on Retrospective Review of CARB
Administrative Regulations Per Executive Order S-2-03

The Air Resources Board is conducting a retrospective review of all **regulations** adopted, amended or repealed by the ARB since January 6, 1999, as required by the Governor's Executive Order S-2-03. As stated in the Executive Order, this retrospective review must address:

1. The impact of each rule on California businesses;
2. The authority for the adopted, amended or repealed regulations; and
3. Conformity with statutory criteria for necessity, authority, clarity, consistency, reference and nonduplication.

Public comments on this review are welcome and should address the specific criteria described above. Please direct such comments to Ms. Diane Johnston, General Counsel, at regreview@arb.ca.gov. The deadline for public comments on the retrospective rule review is January 30, 2004.

The ARB is conducting an identical review for regulations approved by its Governing Board but not yet final. This category contains mostly rulemakings undertaken in the latter half of 2003. For some of these rules, 15-day changes are still pending and there will be a future opportunity for public comment. In those cases, we request that any comments prompted by Executive Order S-2-03 be submitted at the time that public comment is reopened. For all other pending rulemakings, please address your comments to Ms. Diane Johnston at the address above. The latter comments will not be part of the public record for individual rules, but will be used to assess whether any adjustments to the near final rulemakings are warranted.

Finally, the ARB's Governing Board held public hearings and took public testimony on four new regulatory items in November and December of last year, but deferred final action pending approval to proceed by the Department of Finance. That approval was granted on December 10, 2003. Accordingly, the ARB intends to reschedule the four open rulemakings for consideration by the Board at its February 26-27, 2004, public hearing. The public comment period is still open for all four of these rulemakings and comments pertinent to Executive Order S-2-03 are welcome. The four open rulemakings are:

1. Airborne Toxic Control Measure for Stationary Diesel Engines
2. Heavy-Duty Diesel Engine Software Upgrade ("Chip Reflash")
3. Airborne Toxic Control Measure for Transportation Refrigeration Units
4. Diesel Retrofit Verification Procedures

Public hearing notices issued for the first time after November 17, 2003, are not subject to Executive Order S-2-03. However, it is ARB's intent to comply fully with the spirit of the Executive Order when considering all future regulations. Specifically, the ARB intends to assure strict compliance with all statutory requirements applicable to state agency rulemakings, and to thoroughly examine the potential impacts of proposed rules on the California business community. The ARB will also continue to conduct its customary analyses of all air quality, public health, and economic benefits that may derive from proposed regulations.